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IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1944

No. 37

TOM TUNSTALL,  
*Petitioner,*

v.  
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND  
ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK  
LODGE NO. 775, W. M. MUNDEN and NORFOLK SOUTH-  
ERN RAILWAY COMPANY.

On Certiorari to the United States Circuit Court of Appeals  
for the Fourth Circuit.

No. 45

BESTER WILLIAM STEELE,  
*Petitioner,*

v.  
LOUISVILLE & NASHVILLE RAILROAD CO., a corporation;  
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND  
ENGINEMEN, W. H. THOMAS, J. P. ADAMS and B. F.  
MCGILL.

On Certiorari to the Supreme Court of Alabama.

**MOTION FOR LEAVE TO FILE BRIEF AS AMICUS  
CURIAE AND BRIEF IN SUPPORT THEREOF**

AMERICAN CIVIL LIBERTIES UNION.

*Amicus Curiae*

EDGAR WATKINS,  
of the Georgia Bar,

JOHN D. MILLER,  
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of the Mississippi Bar,

SHIRLEY ADELSON,  
ARTHUR GARFIELD HAYS,  
of the New York Bar,

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**Motion for Leave to File Brief as Amicus Curiae**

May it Please the Court:

The undersigned, as counsel for the American Civil  
Liberties Union, respectfully moves this Honorable Court  
for leave to file the accompanying brief in these cases as

*Amicus Curiae.* The consent of the attorney for the petitioners to the filing of this brief has been obtained. Attorneys for the respondents have refused to grant their consent.

Special reasons in support of their motion are set out in the accompanying brief.

November 14, 1944.

ARTHUR GARFIELD HAYS,  
*Counsel for American Civil Liberties Union*  
*Amicus Curiae.*

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On Certiorari to the Supreme Court of Alabama.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION,  
 AMICUS CURIAE**

These cases question the validity of the restrictions  
 which have been imposed on Negro locomotive firemen by  
 agreement between their statutory representative under  
 the Railway Labor Act and their employers.

## Statement of Interest of American Civil Liberties Union

The American Civil Liberties Union is a national organization, devoted to the protection of civil liberties from the standpoint of the general public whose interests it seeks to defend. It does not express the point of view of labor, of employers, or of any particular racial group, but is a participant on these appeals on the principle that a threat to the civil liberties of one group, or even of one person, is a challenge to the freedom of all.

In our opinion, the restrictions imposed on Negro employees by the agreements in issue constitute an unlawful deprivation of fundamental rights guaranteed by the Federal Constitution. Because of the serious implications of these cases for the future of civil liberties in the United States, we have asked leave of this Honorable Court to file a brief *amicus curiae*.

### Restrictions on the Employment and Advancement of Negro Locomotive Firemen

For fifty years Negroes were the accepted majority of firemen on Southern railroads. But particularly since the last War a trend has been under way to drive Negroes from this employment. Contributing factors were the introduction of automatic stokers and diesel-powered engines, whereby dirty, heavy work was transformed into a desirable job, and intensified competition for jobs attendant upon the declining importance of the railroad industry.

On March 28, 1940, the Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the "Brotherhood"), acting as representative of the entire craft of firemen under the Railway Labor Act on each of 21 rail-

roads, served on the railroads a notice of the following proposals for modification of existing collective bargaining agreements:

"1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

"2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

"3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them."

(Record in *Steele* case at p. 59.)

In railroad parlance, white firemen universally are called "promotable men" and Negroes are designated as "non-promotable men." This is so, because under railroad practice engineers are chosen by promotion from the ranks of firemen, and Negroes are never promoted to the rank of engineer.

With these proposals the Brotherhood aimed at driving the Negro firemen completely out of the service of the railroads and creating a closed shop for its own membership. Negroes at no time have been admitted to membership in the Brotherhood, which is nevertheless their bargaining representative under the Act.

Thereafter, the Brotherhood and the railroads entered into an Agreement on February 18, 1941, seriously curtailing Negro firemen's employment and seniority rights in the railroad industry. The Agreement restricted their employment to seniority districts on which they were then working and provided that they should not exceed fifty

per cent of the employees in each class of service on the seniority district; until such percentage should be reached only promotable men were to be hired and all new runs and vacancies filled by promotable men. The Agreement further reserved the right of the Brotherhood to press for more restrictions on Negro firemen's employment on individual carriers.

In or about May, 1941, the railroads and the Brotherhood negotiated a supplementary agreement for the practical administration of the Agreement of February 18, 1941, providing *inter alia* that the Brotherhood firemen should get the odd job in each class of service.

At no time did the Negro firemen receive notice of the proposed, then executed Agreements, nor an opportunity to be heard.

No attempt has been made to justify the foregoing Agreements as germane to the efficiency of railroad operation.

The President's Fair Employment Practice Committee reviewed these facts at a series of hearings, and on November 18, 1943, issued "findings and directives" declaring the February 18, 1941 Agreement and its supplements discriminatory and ordering that they be set aside. Further illumination of the background and content of these Agreements is to be found in Northrup, *Organized Labor and the Negro* (1944), Chapter III.

The operation of the restrictions is illustrated by the facts out of which arose both cases at bar. In the *Steele* case, the petitioner had been in a "passenger pool" composed of six firemen, of whom five were Negro. On April 8, 1941 the pool was reduced to four, and although the petitioner and two other Negro firemen were entitled to

remain in the pool by reason of seniority and good service, the Railroad and the Brotherhood, pursuant to the Agreement of February 18, 1941, arbitrarily disqualified all Negro firemen and reformed the pool with four white firemen, all junior to the petitioner. For a while the petitioner was completely out of work. He then took an arduous and less remunerative job on a local freight and finally lost that job, too, to a junior fireman because of the above Agreements, in spite of the fact that no complaint had been made about his work.

Similarly, in the *Tunstall* case, the petitioner had been serving as fireman on an interstate passenger run, considered a desirable post, when, because of the Agreements, he was removed and assigned to a more difficult and arduous job.

### State of the Cases

In the *Steele* case, the petitioner filed a suit in the Alabama Circuit Court for: (1) an injunction against the Railroad Company and Brotherhood to restrain them from enforcing a sole bargaining agent agreement negotiated by the Brotherhood; (2) an injunction against the Brotherhood from acting as his alleged bargaining representative so long as it discriminated against Negroes; (3) a declaratory judgment; (4) damages. Demurrers to the amended complaint were sustained by both the lower court and the Alabama Supreme Court. (16 So. 2d 416.)

In the *Tunstall* case, the petitioner filed a complaint in the Federal District Court for the Eastern District of Virginia seeking: (1) \$25,000 damages for the refusal of the Brotherhood to accept him for membership on account of his race or color, which led directly to his removal

from his job with the Railroad Company; (2) a declaratory judgment declaring the rights and privileges of the parties and that the Brotherhood, acting as exclusive bargaining agent under the Railway Labor Act, was obliged to represent all members of the class involved regardless of race or color; (3) an injunction against enforcement of the agreement between the Brotherhood and the Railroad; (4) an injunction against the Brotherhood from acting as an alleged representative so long as it discriminated against Negroes in membership; (5) restitution to his position. Respondents' motions to dismiss were granted and the United States Circuit Court of Appeals for the Fourth Circuit affirmed. (140 F. 2d 35.)

### Importance of the Question

Forthright decision of the questions at issue is of crucial importance. American railroads, in wartime, are suffering a shortage of firemen, at a time when experienced Negro firemen are available." (See monthly reports of Railroad Retirement Board.) Evidence has been presented before the President's Committee on Fair Employment Practice of resulting delays in many instances and of at least one accident. And of the bloody consequences of attempts to drive out Negroes even from their non-promotable classification of locomotive firemen on the Southern railroads, there has been official acknowledgment. See Northrup, *op. cit. supra*, at page 55, citing "Proposed Report of the Federal Coordinator of Transportation on Alleged Discrimination Against Colored Railway Employees of the Illinois Central System", unpublished Ms. in U. S. Archives.

The concerted attempt to drive Negroes out of the jobs of locomotive firemen has already reached the point of interference with interstate commerce. It was that interference that the Railway Labor Act was designed to prevent. Therefore there should be no question of jurisdiction under the Act to decide these momentous issues. As the Supreme Court has many times had occasion to state, the purpose of the Railway Labor Act is to provide means of settlement of disputes that otherwise would interfere with interstate commerce (*Terminal Railroad Association v. Brotherhood of Railroad Trainmen*, 318 U. S. 1, at 6):

"The Federal interest that is fostered [by the Railway Labor Act] is to see that disagreement about conditions does not reach the point of interfering with interstate commerce."

Only by a square determination of the problems at issue will this Court be properly effectuating Congressional intent behind the Railway Labor Act.

Moreover, a decision will have telling consequences for the definition of the rights of minority workers everywhere vis-à-vis their statutory representatives. Such representatives are "exclusive" for collective bargaining purposes under the National Labor Relations Act no less than under the Railway Labor Act, and in this role have extensive opportunities for domination, still undefined. Indeed the possibilities of oppression are particularly great under the National Labor Relations Act which, unlike the Railway Labor Act (Section 2 (5)), countenances closed shop contracts.

From the standpoint of the civil liberties at stake it would seem essential to the preservation of basic prin-

ciples of our democracy, to give the Fifth Amendment to the Constitution its proper interpretation, namely, a means whereby the deprivation of the right to work on account of race, which is in issue here, may be declared unlawful. During the coming months this question may be anticipated to become even more acute, as reconversion and the consequent shrinkage of jobs may cause a repetition of such tactics at the expense of Negro workers, who have won a foothold in industry during the war.

### POINT I

**The restrictions on the employment of Negro locomotive firemen contained in the agreements between the Brotherhood and the railroads are against public policy and are unlawful.**

There is not even a pretense of legitimate social objective behind the restrictive Agreements whereby Negroes are to be driven from their employment as locomotive firemen. No plea is made that such Agreements are essential to the efficiency of the railroads. The proposals came from the Brotherhood, and no justification is offered in terms of collective bargaining privileges, or advancement of the working conditions of firemen as a craft or class. The sole motivation lies in the individual interests of the members of the Brotherhood, who would establish a closed shop (Negroes excluded), notwithstanding the prohibition of the Railway Labor Act (Section 2 (5)).

### A

By virtue of its position as exclusive bargaining representative under the Act (*Virginian Railway v. Federation*, 300 U.S. 515), the Brotherhood wields considerable power

over who may and who may not be made available for jobs and advancement. American courts (questions of Federal jurisdiction aside) have been quick to realize that the individual must be guarded against the exercise of this kind of a power when not in furtherance of legitimate social objectives. Thus, the coexistence of a closed shop and a restricted membership union has been held unlawful.

"It seems to me necessarily to follow that the union must either surrender its monopoly or else admit to membership all qualified persons who desire to carry on the trade of magazine mailers; otherwise such persons are by the act of the union deprived of the right to earn a livelihood." *Wilson v. Newspaper and Mail Deliverers Union*, 123 N. J. Eq. 347, 197 Atl. 720.

See also *Schwab v. Moving Pictures Machine Operators Local*, 109 Pac. (2d) 600 (Oregon).

In *Cameron v. International Alliance*, 118 N. J. Eq. 11, 178 Atl. 692, classification of union members into seniors and juniors was held to be an unreasonable restraint and unlawful, where the juniors were denied the right to participate in the formulation of union policy of the management of union business, and seniors were given power arbitrarily to bar juniors from Union membership. The Court stated that it was clear that the subject in controversy was a property right guaranteed by Federal and State constitutions and that by such regulations, "the constitutional and inalienable right to earn a living" was being bargained away. Constitutional rights of liberty and property may be limited "only to the extent necessary

to subserve the public interest. \* \* \* The design is not to advance the public welfare, but the individual interests of the senior members solely. It is a perversion, an embezzlement of power." The Court concluded:

"It is patent that the senior members are striving to obtain a monopoly of the labor market in this particular trade, and to deprive the junior members of an equal opportunity to obtain employment and earn a livelihood for himself and his family. In fact, monopoly has been practically accomplished—absolute and complete dominion of the labor market is within reach. The public evils flowing from this policy are apparent. It tends to economic servitude—the impoverishment of the one class, the 'juniors' for the enrichment of the other—and is manifestly opposed to the public interest. *The inevitable results are the loss of the services of useful members of society, and unrest, discontent and disaffection among the workers so restrained—a condition that is unquestionably inimical to the public welfare.*" (Emphasis supplied.)

In accord with the principles animating the decision in the *Cameron* case are *Smetherham v. Laundry Workers' Union*, 44 Cal. App. (2d) 131, 111 Pac. (2d) 948, where it was held improper to expel plaintiff from the Union since the Union's interest had not been adversely affected by her fight with a fellow employee which was the occasion for the expulsion; *Reilly v. Hogan*, 32 N. Y. S. (2d) 864, aff'd 264 App. Div. 855, where in ordering reinstatement of a Union member expelled for the alleged circulation of deceitful statements concerning Union leaders during the Union election campaign, the court stated that "as umpire, the Court inquires whether fair play has

been practiced. \* \* \* No individual or group of individuals, organized or unorganized, is above the law"; and *Walsche v. Sherlock*, 110 N. J. Eq. 223, 159 Atl. 661, where the Union officers were successfully restrained from using a card index system under which an employee could not work without an employment card from the Union.

An instructive decision was that of the Kentucky court in *Piercy v. Louisville & N. R. Co.*, 198 Ky. 477, 248 S. W. 1042 (before passage of Railway Labor Act). There, as in the cases at bar, seniority rights under a contract were violated by an order of the company "for no reason involving the efficiency of the operation of the railroad and for the only reason that it had been requested by" the Union. The complainant was a member of the Union. The court held that the Union was his representative only.

"for the limited purpose of securing for him, together with all other members, fair and just wages and good working conditions. \* \* \* If the right of seniority may be changed or waived, or otherwise dispensed with by the act of a bare majority of an organization, \* \* \* it would be builded upon a flimsy foundation of sand which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him."

### B

Where the oppression made possible by monopoly of the job market is drawn along racial lines, the public interest is even clearer. This has been recognized by the decisions of several American courts, granting an injunction against the compulsory relegation of Negroes to separate auxiliary union locals. *Joseph James etc. v. Marinship*

*Corporation et al.* (Superior Court, Calif., Feb. 17, 1944, on appeal to the California Supreme Court); *Gerald R. Hill et al. v. International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers of America et al.* (Superior Court, R. I., January, 1943). (Both unreported.)

Irrelevant distinctions on the basis of race or nationality are "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, at 100. Where the right to earn a livelihood is involved, such distinctions are particularly odious to this Court. *Truax v. Raich*, 239 U. S. 33.

In *Truax v. Raich*, a State statute which attempted to place restrictions on the right of aliens to be employed within the State was struck down as repugnant to the Federal constitution. Noting that under the statute "the complainant is to be forced out of his employment as a cook in a restaurant simply because he is an alien," this Court said (239 U. S. at 41):

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the policy of the Amendment to secure. \* \* \* If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

In the cases at bar the right to work is being denied to Negro locomotive firemen, solely because of their race and without any legitimate reason for the classification, and by virtue of exclusive bargaining rights given to the white Brotherhood as majority representative under the Railway Labor Act.

## POINT II

**The rights of petitioners are protected by the Fifth Amendment.**

There can and should be no question but that the infringement of the right of Negroes to work falls within the condemnation of the Fifth Amendment to the Federal constitution. That the Fifth Amendment prohibits arbitrary distinctions along racial lines was clearly indicated by this Court in the recent case of *Hirabayashi v. United States*, 320 U. S. 81.

The cases here do not involve action by private individuals, with respect to which the restraints of the Fifth Amendment do not apply (*Corrigan v. Buckley*, 271 U. S. 323). The restrictive agreements were made only by virtue of a grant of governmental authority under the Railway Labor Act. Solely by virtue of that statute does the Brotherhood represent the entire class of firemen, and not by mandate of the men themselves.

The agreement between the Brotherhood and the railroads, consummated under the Railway Labor Act, is no more free from constitutional restraint on the denial of property without due process of law than were the restrictions at issue in the leading case of *Nixon v. Condon*, 276 U. S. 78. In *Nixon v. Condon* it was under a State statute, whereby every political party through its executive committee was to have power to prescribe the qualifications of its own members, and not under any authorization from the ranks of the party, that the executive committee of the Democratic party in Texas adopted a resolution that only white Democrats should participate in the primary elections, thereby excluding Negroes. The com-

mittee's action was held to be State action within the meaning of the Fourteenth Amendment to the Constitution. Similarly, it is only because of authority derived from the Railway Labor Act and not because of any authorization from the employees themselves, including the petitioners involved in these cases, that the Brotherhood and the railroads adopted certain agreements whereby Negroes would be restricted and gradually driven from the jobs of locomotive firemen. The Court stated in *Nixon v. Condon* as follows:

"The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. \* \* \* The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action."

Thus there can properly be no question of the cognizance under the Fifth Amendment to the Constitution of the important questions of civil liberties raised on this appeal.

Because of the presence of serious constitutional issues, as well as because of a significant variance on the facts and the law, these cases are sharply distinguishable from earlier decisions of this Court, in which there was a finding of no Federal jurisdiction under the Railway Labor Act. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (reviewability of certification order); *General Committee, etc. v. M. K. T. R. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S.

338 (all involving jurisdictional disputes between rival railway unions referable to the National Mediation Board). In the *Switchmen's* case the Court even expressly stated (320 U. S. at 301):

*"All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced."* (Emphasis supplied.)

Indeed, as under well-established canons of construction statutes should, where possible, be construed as constitutional, the Congressional intent behind the Railway Labor Act should not properly be interpreted to grant exclusive bargaining rights without the implicit condition that the grant will not be used to oppress a minority.

## CONCLUSION

The Agreement of February 18, 1941 and its supplementary agreements should be declared invalid; an injunction should be ordered to restrain any further acts pursuant thereto; petitioners should be restored to their rights; the obligation of the statutory representative under the Railway Labor Act to represent minority employees fairly should be declared; and other and further relief prayed for by the petitioners should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,

*Amicus Curiae.*

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# SUPREME COURT OF THE UNITED STATES.

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[December 18, 1944.]

Mr. Chief Justice STONE delivered the opinion of the Court.

This is a companion case to No. 45, *Steele v. Louisville & Nashville Railroad Co., Brotherhood of Locomotive Firemen and Enginemen and others*, decided this day, in which we answered in the affirmative a question also presented in this case. The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. §§ 151, et seq., imposes on a labor organization, acting as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race. The further question in this case is whether the federal courts have jurisdiction to entertain a non-diversity suit in which petitioner, a railway employee subject to the Act, seeks remedies by injunction and award of damages for the failure of the union bargaining representative of his craft to perform the duty imposed on it by the Act, to represent petitioner and other members of his craft without discrimination because of race.

Petitioner, a negro fireman, employed by the Norfolk & Southern Railway, brought this suit in the District Court against the Railway, the Brotherhood of Locomotive Firemen and Enginemen and certain of its subsidiary lodges, and one of its officers, setting up, in all material respects, a cause of action like that alleged in the *Steele* case. The Brotherhood, a labor union, is the designated bargaining representative under the Railway Labor Act, for the craft of firemen of which petitioner is a member, and is accepted as such by the Railway and its employees.

Acting as such the Brotherhood gave to the Railroad the notice of March 28, 1940, and later entered into the contract of February

2 *Tanstall vs. Brotherhood of Locomotive Firemen etc., et al.*

18, 1941 and its subsequent modifications, all of which were the subject of our consideration in the *Steele* case. Petitioner complains of the discriminatory application of the contract provisions to him and other Negro members of his craft in favor of "promotable", i.e. white, fireman, by which he has been deprived of his pre-existing seniority rights; removed from the interstate passenger run to which he was assigned and then assigned to more arduous and difficult work with longer hours in yard service, his place in the passenger service being filled by a white fireman.

He alleges that the contract was signed and put into effect without notice to him or other Negro members of his craft, and without opportunity for them to be heard with respect to its terms, and that his protests and demands for relief to the Railway and the Brotherhood have been unavailing. Petitioner prays for a declaratory adjudication of his rights, for an injunction restraining the discriminatory practices complained of, for an award of damages and for other relief.

The District Court dismissed the suit for want of jurisdiction. The Circuit Court of Appeals for the Fourth Circuit affirmed, 140 F. 2d 35, on the ground that the federal courts are without jurisdiction of the cause, there being no diversity of citizenship and, insofar as the suit is grounded on the wrongful acts of respondents, it is not one arising under the laws of the United States, even though the union was chosen as bargaining representative pursuant to the Railway Labor Act. See *Gully v. First National Bank*, 299 U. S. 109, 112, 114.

For the reasons stated in our opinion in the *Steele* case the Railway Labor Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts. Cf. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297; *General Committee v. M-K-T. R. Co.*, 320 U. S. 323; *General Committee v. Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railway & Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715, 816; with *Terrell & New Orleans Railroad Co. v. Brotherhood of Railway Clerks*, 281 U. S. 518; *Virginian Railway Co. v. System Federation*, 300 U. S. 515.

We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is

*Tunstall vs. Brotherhood of Locomotive Firemen etc., et al.* 3

the federal statute which condemns as unlawful the Brotherhood's conduct. The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. *Deitrick v. Greaney*, 309 U. S. 190, 200-201; *Board of County Commissioners v. United States*, 308 U. S. 343; *Sala Electric Co. v. Jefferson Co.*, 317 U. S. 173, 176-7; cf. *Clearfield Trust Co. v. United States*, 318 U. S. 363. The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41(8), Judicial Code § 24(8); *Mulford v. Smith*, 307 U. S. 38, 46; *Peyton v. Railway Express Agency*, 316 U. S. 350; cf. *Illinois Steel Co. v. B. & O. R. Co.*, 320 U. S. 508, 510-511.

For the reasons also stated in our opinion in the *Steele* case the petitioner is without available administrative remedies, resort to which, when available, is prerequisite to equitable relief in the federal courts. *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117, 123; *Porter v. Investors Syndicate*, 286 U. S. 461, 471; 287 U. S. 346; *Natural Gas Co. v. Slattery*, 302 U. S. 300, 309; *Atlas Ins. Co. v. Southern Inc.*, 306 U. S. 563.

We hold, as in the *Steele* case, that the bill of complaint states a cause of action entitling plaintiff to relief. As other jurisdictional questions were raised in the court below which have not been considered by the Court of Appeals, the case will be remanded to that court for further proceedings.

*Reversed.*

Mr. Justice MURPHY concurs in the result for the reasons expressed in his concurring opinion in *Steele v. Louisville & Nashville R. R. Co.*